had confined his evidence to the issue as to whether the determination of the contract was justified, he meant exactly what he said and that was tantamount to his reliance only on clause 25(1)(c). It is interesting to note that the evidence led by him related only to the issue. The only notices he referred to again related only to this issue and at no stage of his address was clause 25(1)(b) ever mentioned.

As I have already pointed out, it is common ground that no one relied on total suspension of the contract or termination under clause 25(1)(a).

I therefore find that the respondents [appellants] relied only on clause 25(1)(c) on the question of termination in presenting their case to me."

The alleged misconduct

From the facts which their Lordships have so far recounted, there can be not the slightest justification for any suggestion of misconduct by the arbitrator, either by his failing to observe the rules of natural justice during the remission hearing or at all. The basis for the complaint made arises in these circumstances. During the course of the remission hearing, Mr. Selvadurai maintained that he was handicapped in that, as he had not appeared as counsel at the earlier hearing before the arbitrator, the only notes which he had of the evidence were the notes, to which their Lordships have earlier referred, of the first part of the arbitration. He therefore applied to the arbitrator for the arbitrator to make available to him the balance of his notes. The arbitrator following the appropriate practice, (see *Tersons Limited* v. *Stevenage Development Corporation*[1]) had not exhibited his notes of evidence to his interim award. He therefore felt, and so stated, that he was precluded from complying with Mr. Selvadurai's request. In forming this view he was clearly wrong.

The issue at the remission hearing was directed to whether or not the appellants had limited their case to clause 25(1)(c). This depended upon what had taken place before him during the arbitration. In their Lordships' judgment he was clearly at liberty, if he had been so minded, the matter being entirely for him to decide, to provide the parties with copies of his notes in order to assist in the resolution of that issue. He was under *no duty* to supply copies of his notes. However the fact that he misunderstood his entitlement to show the parties his notes, does not of itself result in any unfairness or in any failure to observe the rules of natural justice, this being the basis of the misconduct asserted. He had already provided the parties with a note of what he viewed as the most important aspect of what had occurred before him when the arbitration took place, namely a note of Mr. Karthigesu's opening. The balance of the notes he had withheld not merely from the appellants but from both parties. He had thus acted even-handedly. He had allowed the appellants to mitigate their self-induced difficulties caused by changing counsel so to speak "in mid-stream" by allowing Mr. Karthigesu to be present and to provide any information and assistance which could advance the appellants' contentions. Moreover, if Mr. Cresswell's instructions are correct, and Mr. Karthigesu's letters referred to above were not put before the arbitrator, then the appellants enjoyed a significant advantage to which they were not entitled. As to the merits of his decision their Lordships can detect no hint of unfairness, it being entirely consistent with Mr. Karthigesu's own statement in his letter of October 15, that as the case progressed and in his opening and concluding addresses he confined himself to the notices and the facts and circumstances to bring the case solely within clause 25(1)(c).

For the reasons they have given, their Lordships dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Clifford-Turner; Taylor Garrett.*

DR. S. UNDERWOOD v. ONG AH LONG

[P.C. (Lord Keith of Kinkel, Lord Brightman, Lord Griffiths, Lord Mackay of Clashfern & Lord Oliver of Aylmerton) April 29 & 30 & May 22, 1986]

[Privy Council Appeal No. 4 of 1984]

Tort – Negligent driving – Damages – Damages for pain and suffering agreed – Damages for loss of earnings – Loss of future earning capacity disallowed – Assessment of damages.

Practice and Procedure – Amendment of statement of claim – Special damages – Whether adequate notice given.

Damages – Injury to arm and hand of major plastic surgeon – Quantum – Assessment of damages.

This was an appeal from the decision of the Federal Court reported at [1983] 2 M.L.J. 324 whereby the Court allowed an appeal from the decision of the High Court in Ipoh.

The appellant claimed damages from the respondent for personal injuries sustained in an accident on March

21, 1967 when he was a pedestrian in Hugh Low Street, Ipoh. Dr. Underwood was struck by a motor van driven by the respondent and suffered an injury to his left forearm which caused weakness of the left arm, loss of grip in the left hand and tremors of the left wrist and fingers. The respondent was found wholly to blame for the accident by the learned trial judge and no question now arises with regard to that part of his decision.

By agreement, the learned judge found Dr. Underwood entitled to $5,000 as general damages for pain, suffering and loss of amenities and $2,000 a month for two months in respect of loss of earnings and $200 per week for 20 weeks in respect of partial loss of earnings and $200 in respect of damage to his watch. He also found Dr. Underwood entitled to special damages for loss of earnings amounting to $899,000 as pre-trial loss on the basis of a net sum of $62,000 per annum after allowance of 50% for the tax element and also entitled to the sum of $1,118,440 as special damages for loss of earnings as post-trial loss on the basis of net post-tax loss of $14,500 per month and using a multiplier of 8 years. The learned judge further ordered that the respondent pay to Dr. Underwood interest at the rate of 8% per annum on general damages from the date of service of the writ to the date of judgment and at the rate of 4% per annum on special damages of $907,200 only from the date of the action until the date of judgment and at the rate of 8% from the date of judgment till the date of realisation. Dr. Underwood was found entitled to his costs of the suit from the respondent on a party and party basis.

On appeal the Federal Court set aside the awards of $899,000 and $1,118,440 and substituted an award of $51,000 as general damages for loss of future earning capacity. The Federal Court also ordered that the award of interest on general damages at the rate of 8% be reduced to 6% per annum and the award of interest on special damages at the rate of 4% be reduced to 3%. In this appeal, Dr. Underwood argued that the judgment of the Federal Court of Malaysia should be set aside and the order of the High Court be restored.

In the statement of claim particulars of special damages were given:

(a) Loss of earnings for two months at $3000/– a month	$6,000
(b) Partial loss of earnings for a further period of 20 weeks at $300 a week	$6,000
(c) Damage to Rado watch	$200
	$12,000

and went on to claim

(1) Damages;

(2) Special damages to $12,000;

(3) Interest at the rate of 6% from the date hereof to date of realisation;

(4) Costs

On the opening of the trial, counsel for the appellant sought amendment of paragraph (b) under special damages by insertion of the words "and still continuing on an unspecified rate to be assessed." Counsel for the respondent objected but the court overruled the objection and the amendment was allowed. In the Federal Court it was held that the trial judge erred in allowing the amendment.

Held: (1) the amendment proposed on behalf of the appellant on the first day of the trial was altogether lacking in specification and utterly inappropriate in form to give fair notice of the evidence which it was proposed to lead on his behalf. It would have been a manifest injustice if the respondent had been obliged to present his cross-examination and his evidence immediately following the appellant's evidence supporting what it had been intended to plead by amendment. However, in this case, there was in fact a very substantial period of delay between the first and second days of the trial and further delay before the main evidence for the respondent had to be called. The respondent did have adequate notice by the appellant's evidence of the case which he sought to present and having heard it the respondent had ample opportunity, by the course the proceedings took, to challenge the appellant in cross-examination and by counter-evidence before the trial was concluded. In the circumstances there is no good reason why the evidence in support of the awards made by the trial judge, which have been challenged by the respondent before the Federal Court should not be available for consideration;

(2) the fundamental reason that the Federal Court set aside the parts of the trial judge's award, which are the subject of the appeal, was their conclusion that the evidence about the possible earnings of a surgeon who practised major plastic surgery was not satisfactory. The assessment of the evidence was a matter particularly within the sphere of the trial judge and in the absence of any countervailing evidence whatever, notwithstanding the opportunity that the respondent had to seek it, the trial judge was entitled to conclude that the income of a major plastic surgeon in Malaysia was reasonably estimated at $35,000 per month;

(3) although the figures for a major plastic surgeon are the possible earning capacity of the appellant, it is not correct to assume that he lost this amount. It is clear reading the learned judge's decision as a whole that he did not regard it as having been established as certain that the appellant would have earned this amount and yet he allowed this loss of income as if it was certain. The learned judge therefore erred in principle;

(4) in the circumstances it is right to assess the chance that the appellant would have become a major plastic surgeon with the earning pattern found by the trial judge at a level which would allow him 50% of those additional earnings as a proper award. The pre-trial loss of income would therefore be $499,500;

(5) for the post-trial loss it is reasonable to assume, as did the Federal Court, a working life of eight years from the date of trial with a multipler of 6 years. Discounted at 50% this gives an award for post-trial loss of $522,000;

(6) the order of the Federal Court should be amended by ordering that there should be an award to the appellant of $499,500 for pre-trial loss of earnings and of $522,000 for post-trial loss of earnings and that the award of $51,000 as general damages for loss of future earning capacity be deleted from the order.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

Michael Wright Q.C. (*Miss Anna Guggenheim* and *P.S. Gill* with him) for the appellant.

Eugene Cotran (*N. Selvarajah* with him) for the respondent.

Cur. Adv. Vult.

Lord Mackay of Clashfern (delivering the Judgment of the Board): This is an appeal from the judgment of the Federal Court of Malaysia (Lee Hun Hoe C.J. (Borneo), George Seah and Syed Agil Barakbah F.JJ.) dated July 29, 1983 whereby that Court allowed an appeal from the decision of the High Court at Ipoh (Anuar bin Dato' Zainal Abidin J.). The appeal is by leave of the Federal Court of Malaysia granted on October 26, 1983.

The appellant ("Dr. Underwood") claims damages from the respondent for personal injuries sustained in an accident on March 21, 1967 when he was a pedestrian in Hugh Low Street, Ipoh. Dr. Underwood was struck by a motor van driven by the respondent and suffered an injury to his left forearm which caused weakness of the left arm, loss of grip in the left hand and tremors of the left wrist and fingers. The respondent was found wholly to blame for the accident by the learned trial judge and no question now arises with regard to that part of his decision.

By agreement, the learned judge found Dr. Underwood entitled to $5,000 as general damages for pain, suffering and loss of amenities and $2,000 a month for two months in respect of loss of earnings and $200 per week for 20 weeks in respect of partial loss of earnings and $200 in respect of damage to his watch. He also found Dr. Underwood entitled to special damages for loss of earnings amounting to $899,000 as pre-trial loss on the basis of a net sum of $62,000 per annum after allowance of 50% for the tax element and also entitled to the sum of $1,118,440 as special damages for loss of earnings as post-trial loss on the basis of net post-tax loss of $14,500 per month and using a multiplier of 8 years. The learned judge further ordered that the respondent pay to Dr. Underwood interest at the rate of 8% per annum on general damages from the date of service of the writ to the date of judgment and at the rate of 4% per annum on special damages of $907,200 only from the date of the action until the date of judgment and at the rate of 8% from the date of judgment till the date of realisation. Dr. Underwood was found entitled to his costs of the suit from the respondent on a party and party basis.

On appeal the Federal Court set aside the awards of $899,000 and $1,118,440 and substituted an award of $51,000 as general damages for loss of future earning capacity. The Federal Court also ordered that the award of interest on general damages at the rate of 8% be reduced to 6% per annum and the award of interest on special damages at the rate of 4% be reduced to 3%. In this appeal, Dr. Underwood argues that the judgment of the Federal Court of Malaysia should be set aside and the order of the High Court be restored.

After the accident criminal proceedings were instituted against the respondent. These turned out to be somewhat protracted. Whether for this reason or not the writ in the suit in which this appeal arises was not issued until October 5, 1971. The case was not ready for trial until January 1975 and eventually came on for hearing on February 3, 1981. Before the hearing certain agreed documents and a statement of agreed facts were filed. On January 31, 1981 a bundle of documents not agreed upon was filed including certain medical reports, one of which, after referring to Dr. Underwood's disabilities, concluded "the above disabilities are a definite disadvantage in the use of his left hand while doing fine sustained work like fine plastic surgical and micro-surgical operative procedures." In the statement of claim particulars of special damages were given as follows:—

(a) Loss of earnings for two months at $3,000 a month	$6,000
(b) Partial loss of earnings for a further period of 20 weeks at $300 a week	$6,000
(c) Damage to a Rado watch	$200
	$12,200

and went on to claim:—

"(1) Damages;

(2) Special damages to $12,200;

(3) Interest at the rate of 6% from the date hereof to date of realisation.

(4) Costs."

On the opening of the trial, counsel for Dr. Underwood sought amendment of paragraph (b) under special damages by insertion of the words "and still continuing on an unspecified rate to be assessed." Counsel for the respondent objected

but the court overruled the objection and the amendment was allowed.

The first witness was Dr. Underwood himself. He explained that he had qualified with a degree of MBBS from the University of Ceylon and that he was in Tokyo for about three years on a Japanese government scholarship sponsored by the Malaysian Government. He returned to Malaya in 1961 and worked with the Government. During this employment he had performed major operations including the repair of badly damaged scar and deformed faces and limbs and also cases of hare-lips and cleft palate. At the end of 1961 he resigned with the intention of starting a plastic surgery of his own and at that time he was the first and only plastic surgeon in Malaysia. He started a clinic at Kuala Kangsar and purchased land and drew up plans to build a hospital which was completed in September 1968, fully equipped with an operating theatre for plastic surgery. He claimed that in consequence of the weakness in his left hand, as a result of the accident, he had not been able to do any major plastic surgery after the accident although he could do minor operations such as removing warts, moles, cysts and small scars. For these he charged anything between $30 and $200 per operation but that for major plastic surgery the minimum charge was $500 and went up to $5,000. He claimed that if he could carry on practice as a plastic surgeon, he would be able to earn between $30,000 and $45,000 per month whereas in his present condition he could earn only $6,000 per month. Having given evidence-in-chief, Dr. Underwood was cross-examined and gave details of his income for a number of years stating that his present income was in the region of $71,000 per annum.

The second witness for Dr. Underwood was a specialist orthopaedic surgeon who had given the opinion, to which their Lordships have already referred, which he confirmed in his oral evidence, that the weakness in Dr. Underwood's left hand was a disadvantage to him in performing fine plastic surgical and micro-surgical operations. This witness stated that his gross income per month as a surgeon was about $30,000 per month and that it was possible that the income of a plastic surgeon was high and that it was possible that the income would be between $30,000 to $40,000 per month. He added that there were very few plastic surgeons in the country and there was a wide field for a plastic surgeon there. In cross-examination he stated that his opinion of the income of a plastic surgeon of $30,000 to $40,000 per month was only a guess but the chances were that a plastic surgeon would command a good income. The cross-examination and re-examination of this witness completed the proceedings for that day and the trial was then adjourned and did not come on for trial again until November 23, 1981. Their Lordships were informed that parties knew on February 3, 1981 that the trial was likely to be adjourned on the conclusion of the hearing that day for a substantial period. Prior to the next hearing Dr. Underwood had been examined by Professor Subramaniam on behalf of the respondent in consequence of an order of the court granted by consent.

When the trial resumed on November 23, 1981 Professor Pillay of the University of Singapore, a consultant orthopaedic surgeon, gave evidence that the defect in Dr. Underwood's left hand would prevent him from performing delicate surgery and that in Singapore a plastic surgeon could earn $20,000 a month in normal hours of working and this could go up to $50,000 per month. In the course of cross-examination it was suggested to Professor Pillay that a named plastic surgeon who practised in Malaysia earned only $60,000 net a year but with this suggestion Professor Pillay could not agree.

The next witness was Professor Subramaniam who was interposed during the evidence for Dr. Underwood. He agreed that Dr. Underwood had weakness in his left hand consequent upon the accident and this would mean that an operation requiring one hour, if he had no disability, might take Dr. Underwood two hours and that he might not be able to do certain operations at all in consequence of his disability.

The evidence given by Professor Pillay was interrupted on account of the illness of the judge and it was resumed on February 23, 1982. At the conclusion of Professor Subramaniam's evidence on that date the case was continued till April 26, 1982.

At the continued hearing evidence was given by a lady who had been a patient of Dr. Underwood in 1966. She had been badly injured when someone threw acid on her face which caused severe burns and distortion of her facial features. The judge who saw this lady concluded that the operation on her face had been very successful. In 1967 she went to Dr. Underwood to operate on her neck but he could not do it on account of the tremor in his left hand which he told her had

followed a motor accident. She explained that her first operation cost $500 and subsequent operations $200 and that she went for operation more than twenty times. When Dr. Underwood did not operate on her neck she did not go to another plastic surgeon as she said she was not worried about her neck.

The next witness was a lady who had taken her son, who was then aged five, for an operation on his right eye to remove a swelling. In 1962 the charge was $100 and there was one operation only.

The next witness for Dr. Underwood was a lady who had worked with him as a nurse and assisted him in a large number of operations of plastic surgery. She mentioned double eyelid operations, removing scars, warts, wrinkles from noses, ears, face and hands. She said that the operations came to a stop after his motor accident as his left hand was not steady and he could not carry on the operations. Her recollection was that the charges had varied from $500 to $200. According to her evidence patients came to see him from all over the country. She also gave evidence about the construction of the modern hospital with a modern operating theatre which was well equipped and she stated that he was not able to conduct his operations there because of his injury. Although her principal experience of Dr. Underwood was as his nurse, she had also been his patient and he had done a double eyelid operation on her.

On April 26, 1982, as a result of an earlier application on behalf of the respondent to recall Dr. Underwood for further cross-examination and on behalf of Dr. Underwood's own counsel to recall him, he again gave evidence when counsel for the respondent had a full opportunity to put to him anything he wished arising out of the evidence Dr. Underwood gave on the first day of the trial. In consequence of that cross-examination Dr. Underwood modified considerably details he had given on the earlier occasion. He explained that he had been unable to perform major plastic surgery prior to his accident because he did not have the necessary facilities and he wanted to set up a plastic surgery centre but this was not completed until September 1968. His only major operations were in two cases which he carried out at Assunta Hospital, Kuala Lumpur. This recall of Dr. Underwood completed his case and thereafter the respondent led the remainder of his evidence starting on April 26, 1982.

On April 27, 1982 the respondent called the secretary to the Malaysian Medical Council and also the Deputy Director of Medical Services, Hospital Division, Ministry of Health who had been secretary to the Specialist Committee of the Ministry since 1978. From their evidence it was clear that a doctor with the basic qualification possessed by Dr. Underwood was legally permitted in Malaysia to perform any operation. It was also stated that the first plastic surgery unit in Malaysia was started in June 1970 by the surgeon whose income was the subject of the suggestion, to which their Lordships have already referred, which was made to Professor Pillay in the course of his cross-examination. Neither of these witnesses gave any evidence on the financial aspects of plastic surgery. There was no further evidence relevant to damages led by the respondent. Thereafter counsel for the respondent sought to put in evidence a letter from Japan but the court refused to admit it. The respondent at the end of the evidence which he called applied for an adjournment to call a witness who had not been subpoenaed because apparently he had been willing to come but was now not free to do so. The court declined to grant the adjournment. The income tax assessments relating to Dr. Underwood for 1970 to 1979 were filed by consent and a further agreed bundle of documents was lodged.

On that evidence the trial judge concluded that Dr. Underwood had suffered a permanent disability caused by the accident as a result of which he was unable to use his hands satisfactorily to perform major plastic surgery and that, if he had set up practice as a plastic surgeon for which he had the necessary qualifications and experience and for which he would have been competent, if not for the accident, he would earn more than his earnings at the date of the trial. He assessed the average possible earning capability of Dr. Underwood as a successful plastic surgeon at $35,000 per month at the date of the trial and his actual income at that date as $6,000 per month making his loss of income from the date of the trial onwards $29,000 per month. To arrive at his post-trial loss, the judge deducted from this figure 50% for income tax. He pointed out that Dr. Underwood was at that date 52 years old and he considered that Dr. Underwood would be able to work until 65 giving him 13 years of working life. Allowing for the normal contingencies, he concluded a multiplier of 8 years was reasonable on this basis and he arrived at a loss of post-trial income of $1,118,440 "for 8 years on the annuity figure." In this calculation the judge did not

allow 8 x 12 x $14,500 which would be the normal result using a multiplier of 8 years but obviously made discount from that for some factors which he did not detail. The resulting figure is equivalent to a straight multiplication of the estimated annual loss by about 6½.

For the pre-trial period the judge pointed out that the income that Dr. Underwood would have earned as a plastic surgeon would not immediately have gone up to $35,000 per month when he started but would gradually increase from 1968 to 1982, the date of the trial. During this period Dr. Underwood's actual income had gone up from $40,000 per annum in 1968 to $72,000 per annum in 1982 the difference being $32,000, and he estimated the average actual income at $56,000 per annum. If the average of the income at the beginning of the period and at the end of the period, which produces an estimate of the average actual income, is compared with the actual average taken by adding up the income for all the years that are known and dividing by the number of years in the period, it is seen that the judge slightly over-estimated Dr. Underwood's actual average income for this period. So far as his increased income from plastic surgery is concerned the judge estimated that $15,000 per month over the period from 1962 to 1982 as a reasonable average produced an annual income of $180,000 and an annual loss of $124,000 per annum. From this, income tax at 50% was required to be deducted, leaving a total of $899,000 as the estimated pre-trial loss of income.

As their Lordships have already stated, the respondent challenged these awards by appeal to the Federal Court. The first ground of appeal was that the learned judge had not judicially exercised the discretion vested in him relating to the allowance of amendments when he allowed the amendment at the beginning of the trial to which their Lordships have referred. After reviewing a number of authorities, including authorities in the Court of Appeal in England, the Federal Court reached the conclusion that the trial judge erred in allowing the amendment.

The second matter dealt with by the Federal Court, with which their Lordships are concerned, is whether the learned judge had rightly concluded that the difference in the medical opinions of the three specialist witnesses was only a matter of degree and whether he had reached a correct conclusion upon it. The Federal Court decided that the judge had not taken proper advantage of having seen and heard the expert witnesses in order to assess the value, the liability and impressiveness of the evidence.

Finally the respondent submitted to the Federal Court that the trial judge wrongly gave weight to the figures indicative of the earning of a plastic surgeon given by the two witnesses, to whom their Lordships have referred, and that he applied the wrong principle in making those parts of his award which are challenged which, it was submitted, were manifestly high and excessive in the circumstances. Having reviewed the evidence on these matters, the Federal Court concluded that the evidence relating to earnings of plastic surgeons was of no value and that while Dr. Underwood had pleaded for partial loss of earnings the judge had allowed the full loss. In consequence the Federal Court felt it their duty to interfere with the judge's award. They did so by themselves reviewing the evidence and concluded that Dr. Underwood had established that as a result of the accident he had a diminished earning capacity but that he had not shown loss of any future earnings.

The Federal Court went on to assess an amount for this loss of earning capacity. They based their estimate on the figure of $200 per week agreed for partial loss of earnings in the period of partial incapacity which followed his return to work in 1967. They considered his working life as a major plastic surgeon would be up to 60 and allowed a multiplier of 6. While the Federal Court were willing to make an award of this type for post-trial loss, they considered that such vague material as was contained in the evidence in their view of it, did not justify the making of an award in respect of actual loss to the date of trial.

Their Lordships are in no doubt that the amendment proposed on behalf of Dr. Underwood on the first day of the trial was altogether lacking in specification and utterly inappropriate in form to give fair notice of the evidence which it was proposed to lead on his behalf and, coming as it did fourteen years after the accident, called for explanation why it had come so late. Their Lordships have no doubt that it would have been a manifest injustice if the respondent had been obliged to present his cross-examination and his evidence immediately following Dr. Underwood's evidence supporting what it had been intended to plead by the amendment. However, as their Lordships have said, there was in fact a very substantial period of delay between the first and second days of the trial and further delay before the main

evidence for the respondent had to be called. These delays gave the respondent ample opportunity for investigation of Dr. Underwood's new claim foreshadowed sadly inadequately in pleading but made plain immediately thereafter by his own evidence. After considerable period for investigation the respondent had the opportunity of full further cross-examination of Dr. Underwood and a full opportunity to present any evidence to counter that led for Dr. Underwood which he wished to present.

The purpose of pleading and of the rules by which it is governed is that fair notice of a case a party wishes to put forward is given to his opponent in order that the opponent may have proper opportunity of challenging it both by cross-examination and by countering it in evidence. In the present case, for the reasons which their Lordships have explained, they conclude that the respondent did have adequate notice by Dr. Underwood's evidence of the case which he sought to present and having heard it the respondent had ample opportunity by the course the proceedings took to challenge Dr. Underwood in cross-examination and by counter-evidence before the trial was concluded. In these circumstances their Lordships are of opinion that there is no good reason why the evidence adduced in support of the awards made by the trial judge, which have been challenged by the respondent before the Federal Court, should not be available for consideration.

When the whole evidence is looked at and it is borne in mind that there is no verbatim transcript of the evidence available but only the summary contained in the notes taken by the trial judge, their Lordships consider that the finding that by reason of the accident Dr. Underwood had suffered a permanent disability and that he was unable to use his left hand satisfactorily to perform major plastic surgery was justified. Indeed, although the Federal Court criticised in detail the trial judge's approach to this matter and made their own assessment of the evidence from his notes, they reached the conclusion that:-

> "... the permanent partial disability (of) which the plaintiff was complaining and which was confirmed by the expert medical evidence was that the tremor of the left thumb prevented him from performing major plastic surgery only and the plaintiff had to give up the idea of this branch of medical practice since 1968 or thereabouts."

The fundamental reason that the Federal Court set aside the two parts of the trial judge's award, which are the subject of this appeal, was their conclusion that the evidence of the orthopaedic surgeons and of Dr. Underwood himself about the possible earnings of a surgeon who practised major plastic surgery was not satisfactory. While their Lordships consider that it is open to the comment that the evidence did not come from anyone who practised as a major plastic surgeon, the witnesses who gave evidence in support of Dr. Underwood's case on this aspect were both eminent consultant surgeons and Dr. Sivanathan, the first of those, stated that he had to perform a certain amount of plastic surgery himself as an orthopaedic surgeon and he indicated what his own gross income was per month. It is true that he described his opinion of the income of a plastic surgeon as only a guess but their Lordships consider it appropriate to describe it as an informed guess. Dr. Pillay spoke of the earnings of a plastic surgeon in Singapore and no doubt Dr. Underwood had intended to practice in Malaysia but it was not suggested to Dr. Pillay that the evidence he gave of earnings in Singapore would have no bearing on the likely income of major plastic surgeon in Malaysia.

In the light of the well known authorities referred to in the judgment of the Federal Court, which it is not necessary to review, the assessment of this evidence was a matter particularly within the sphere of the trial judge. In the absence of any counter-evidence whatever, notwithstanding the opportunity that the respondent had to seek it, their Lordships are of the opinion that the trial judge was entitled to conclude that the income of a major plastic surgeon in Malaysia in 1982 was reasonably estimated at $35,000 per month.

Once this estimate has been made, it is appropriate to estimate the pattern of income of a person starting practice as a major plastic surgeon in 1968 in the manner in which it was done by the trial judge, taking a figure of $15,000 per month on average for the period from start up in 1968 to full practice in 1982 and continuing thereafter at the level of $35,000 per month.

But these figures for a major plastic surgeon are, as the learned judge said, referring to Dr. Underwood "his possible earning capacity". It is not correct to assume that he has lost this amount. If the accident had not happened, his income would have depended on whether or not he became a major plastic surgeon. It is clear reading the learned judge's decision as a whole that he did not regard it as having been established as certain that Dr. Underwood would have earned

this money and yet he allowed this loss of income as if it was certain. For this reason their Lordships conclude that the learned judge erred in principle. Both parties agree that since nineteen years have elapsed from the date of the accident it would be quite inappropriate for this case to be remitted for further consideration by the trial judge and therefore their Lordships must make their own assessment, as the parties agreed that they should.

Although Dr. Underwood had completed his training in Japan in 1961 his earnings had not been significantly improved by practice as a major plastic surgeon by the date of the accident in 1967. He gave explanations for that by pointing out that he had no facilities for general anaesthesia, that his opportunity for travelling to Kuala Lumpur to use the facilities of the Assunta Hospital were limited by other commitments, and that he planned and ultimately put into execution the construction of a new hospital with these facilities at Kuala Kangsar which was not ready until 1968. In these circumstances their Lordships think it right to assess the change that Dr. Underwood would have become a major plastic surgeon with the earning pattern found by the trial judge at a level which would allow him 50% of those additional earnings as a proper award. The pre-trial loss of income would therefore be $499,500. For the post-trial loss, their Lordships think it reasonable, as did the Federal Court, to assume a working life of 8 years from the date of the trial with a multiplier of 6 years. Discounted at 50% for the reason which has just been explained, this gives an award for post-trial loss of $522,000.

Counsel for Dr. Underwood did not insist in his original submission that the rates of interest awarded by the trial judge should be restored and was content to accept the reduced rates awarded by the Federal Court.

Their Lordships will accordingly advise His Majesty the Yang di-Pertuan Agong that this appeal should be allowed, that the order of the Federal Court should be amended by ordering that there should be an award to Dr. Underwood of $499,500 for pre-trial loss of earnings and of $522,000 for post-trial loss of earnings and that the award of $51,000 as general damages for loss of future earning capacity ought to be deleted from the order. The appellant is entitled to the costs of the appeal to this Board and to his costs before the Federal Court.

Appeal allowed.

Solicitors: *Turner Kenneth Brown; Le Brasseur & Bury.*

SYARIKAT KEWANGAN MELAYU RAYA v. MALAYAN BANKING BHD.

[P.C. (Lord Keith of Kinkel, Lord Brightman, Lord Griffiths, Lord Mackay of Clashfern & Lord Oliver of Aylmerton) May 1 & 22, 1986]

[Privy Council Appeal No. 68 of 1984]

Land Law – Charged land – Application for sale – Land subject to two charges – Single account – Notice of default – Whether there should have been a separate notice for each charge – Whether each notice should have specified a separate breach for each charge – Notice citing both charges and lumping together sum due under both charges – National Land Code, ss. 241, 253, 254, 268 & Form 16D.

In this case the appellant was the registered proprietor of land and on April 10, 1965 it charged the land to the respondent to secure loan facilities by way of bank overdraft in the sum of $400,000 and interest. In 1967 the appellant executed a further charge to the respondent to secure further loan facilities of $180,000 and interest. The amounts secured by the two charges were advanced to the appellant on a single account with the respondent. In 1980 the respondent's solicitors demanded payment of the overdraft which at that time, together with interest, amounted to $2,374,382.24. The demand was not complied with and the respondent served on the appellant a statutory notice in Form 16D. The notice not having been complied with application was made for an order of sale. The Collector of Land Revenue after holding an inquiry ordered the land to be sold by public auction. The appellant thereupon applied in the High Court to set aside the order. The grounds of the appellant's application was (a) that Form 16D is headed "Notice of default with respect to a charge" and that it was inappropriate to issue a single notice in respect of the whole sum, which was secured not by "a charge" but by two charges. (b) that there should have been two notices specifying how much was claimed under each charge. The application was dismissed in the High Court and the appeal to the Federal Court was also dismissed – see [1984] 1 M.L.J. 115. The appellant appealed and before the Privy Council the first ground was abandoned. It was no longer contended that two separate notices were required, but it was argued that the single notice was invalid on the ground that it failed to specify in relation to each charge the separate specific sum which is secured by that charge the failure to pay which constituted the breach relied on.

Held, dismissing the appeal: the letter of demand written by the solicitors for the respondents, which referred to the breach simply as the failure to repay the principal and interest secured by the charge was a sufficient specification in this case. The perfectly accurate specification of the global amount due on the single account secured by both